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# Does Person with Disability have Right to Reservation in Promotion? An Analysis of the State of Kerala & Ors. Vs. Leesamma Joseph

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## ABSTRACT

*The case commentary tries to analyze the case of state of kerala & ors. vs. leesamma joseph. This case revolves around the Article 16 of the Constitution of India which states equal opportunities in employment. The Indian Constitution aspires to create a society in which all people have equal access to opportunities. The advancements achieved in light of the Constitution's Right to Equality have helped to improve the Indian society. The Constitution's authors intended to create a society in which all people are treated equally. The question of law put forth in this case is whether physically disabled person have reservation in promotion. Consequently, this case engenders analysis of section 32 and 33 of the persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 in this accord.*

## I. INTRODUCTION

**“The elephant needs a thousand times more food than the ant but that is not an indication of inequality.” – Mahatma Gandhi**

Have you thought of discrimination which doesn't amount to inequality? Perplexed? Let's take an instance, Does the elderly in the home receiving the facilities which the young members don't have access to, amounts to discrimination? The answer without a doubt is a No. As such discrimination is done in good intention owing to his age, everyone accepts it. Likewise, in a society, in order to establish social justice, the first and foremost need is to bring every unequal to equal. But how could one achieve this? Have you heard of positive discrimination? Yes, positive discrimination is much needed to bring complete effectiveness of the ideal of Equality. This is why our constitution incorporates the ideology of Reservation. This case revolves around one such aspect showcasing the true intent of legislation.

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## **II. BACKGROUND**

The lawsuit was brought under the persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. At the outset, it is mandatory to state the facts to enable a better understanding. The respondent, a permanently disabled suffering from Post-Polio residual paralysis (L) Lower Limb, was appointed in the year 1996, for the post of typist/clerk in the Department of Police on the compassionate ground on the demise of her brother during service. Subsequently, she qualified the tests for promotion and was changed to other category of Lower Division Clerk in July 2001. Eventually, she was later promoted to the post of senior clerk on 16 September 2004 and in the year 2015, as cashier on 5th May, based on seniority list regarding test qualified Lower Division clerks. Taking everything into account, the respondent contented that she was entitled to promotion to the post of senior clerk with effect from 1st July in 2002 and subsequently to the post of cashier with effect from 20th May in 2012 and thereafter to the post of Junior Superintendent with effect from the date of her entitlement. This debate relies on the reservation under 1995 Act, in the matters of promotion in the light of her physical disability.

Having stated the facts, let's sneak peak at the procedural history of the case. The issue was debated before the High court of Kerala; after the respondent's claim was declined by the Kerala Administrative Tribunal vide the order dated 27th February, 2015. On 9th March, 2020, the High court of Kerala pronounced the judgment in favour of the respondent, thereby setting aside the previous order. Eventually, on 7th January 2021, the learned counsel on behalf of the appellants appealed contending that since the respondent wasn't appointed under the person with disability quota under the said act, 1995, she cannot claim such reservation in the matters of promotion, in the light of her appointment on compassionate ground. The Supreme Court after an introspection of various aspects, decided to deny hampering the relief granted to the respondent as she was retired and only had her financial benefits but to grant leave for the examination of the legal issue. In pursuance to the absence of respondent, the court appointed Mr.Gaurav Agrawal as Amicus Curiae to give able assistance.

## **III. ISSUES**

I. Whether the persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 approve reservation for person with disabilities with regard to promotion?

II. Whether the reservation dealt in section 33 of the persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 is subject to identification

of posts as mentioned in section 32 of the same act?

III. Whether a promotion can be turned down to a physically disabled person owing to the absence of provision dealing with the same?

IV. Whether the respondent can be given promotion taking her physical disability into account, notwithstanding the fact that she was not appointed through the concerned quota?

#### **IV. KEY CONTENTIONS OF THE APPELLATE-**

In Siddaraju's case[1], it was argued that Sections 32 and 33 of the 1995 Act stipulated that 3-4 percent of the government's specified jobs be allocated for the appointment of people with physical impairments. It was argued that this could hardly be construed to indicate that the reserve would apply to promotions as well.

Despite the fact that the respondent had a physical impairment, she was not recruited under the 1995 Act's recruiting procedure; rather, she was appointed on compassionate grounds following the death of her brother—a separate recruitment route. As a result, it was argued that she had no right to reservation in promotion under the 1995 Act.

In accordance with the 1995 Act, the government issued various directives granting 3-4 percent reserve in matters of appointment.

#### **V. JUDICIAL REASONING**

The Decision of the Tribunal - In the mentioned act, this case requires a closer look towards the aspects dealt under Section 32 (Identification of Posts) and Section 33(Reservation of Posts).

The tribunal submitted that the section 32 restricted reservation only to the persons who are directly recruited by the Public Service Commission. The tribunal went on to add that Section 33 conveys the reservation of not less than 3% for persons with disability; however, this section didn't stipulate reservation in matters of promotion.

The tribunal relied on the judgment of Union of India vs. National Federation of the Blind [2]for highlighting the absence of observations in the light of reservation for promotion and the application of reservation with reference to the vacancies. Another judgment quoted was National Confederation for Development of Disabled and Anr. vs. Union of India and Ors.[3] which examined the benefits regarding reservation in promotion and observed that the government orders issued by the government under sec.32 didn't provide for reservation in promotions. Hence, the application was dismissed accordingly.

## **VI. WHAT DID THE HIGH COURT DECIDE?**

The High Court referred the cases of Rajeev Kumar Gupta and Others vs. Union of India and Ors.[4] and Siddaraju vs. State of Karnataka & Ors. to pinpoint that reservation is applicable in the matters of promotion as well. The court also addressed the question of validity of the dicta with reference to the case of Indra Sawhney and Ors. vs. Union of India[5] and Ors. and the ratio was distinguished. Hence, the order of the Tribunal was set aside by the High Court and the respondent was rendered relief.

## **VII. OPINION OF THE AMICUS CURIAE**

The Amicus curiae after inspecting the cantena of concerned judgments listed the questions of law to be debated upon.

### **I. Whether the persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 approve reservation for person with disabilities with regard to promotion?**

This issue demands the assessment of section 32 and 33 to be read with sec. 47 of the Act which deals with Non-Discrimination in Government Employment. On seeing from the context of Equal opportunity for career progression, it would be against the ideal of law if physically disabled are declined reservation to promotion based on the initial recruitment.

Last but not least, the reservation might be given to physically disabled persons if: (i) the Rules provide for promotion from the feeder cadre to the promotional posts; and (ii) posts in the promotional cadre are identified that are capable of being filled by Persons with Disabilities.

The Supreme Court held that the 1995 Act mandates reservation in promotion for person with disability by underlining the cases of Government of India & Anr. vs. Ravi Prakash Gupta & Anr.<sup>8</sup> and Union of India vs. National Federation of the Blind according to which computation of reservations should go hand in hand with total number of vacancies in Cadre strength and there should be no distinction drawn between the posts directly recruited and promotion.

### **II. Whether the reservation dealt in section 33 of the persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 is subject to identification of posts as mentioned in section 32 of the same act?**

There is no doubt that the legislature never intended for the provisions of Section 32 to be used as a weapon to undermine the benefits of reserve under Section 33. In reality, after the 1995 Act, it was necessary to identify positions for reservation reasons right away. The delaying methods used by most government agencies in genuinely executing the objective demonstrate

a resistance to such reservations. It therefore demonstrates that it is often simpler to enact law than it is to change the societal mindset that would want to find methods and means to thwart the objective of the Act adopted, and Section 32 was a prime illustration of this. This Court also required the identification of positions for reservation reasons in *Government of India & Anr. vs. Ravi Prakash Gupta*.

As a result, unless exempted under the proviso to Section 33, identification of posts in every establishment is needed. Identifying the roles was undoubtedly a need for appointment, but the appointment could not be stymied by declining to meet the requirement. In the case of *Union of India vs. National Federation of Blind*, a bigger bench of three judges agreed (*supra*).

### **III. Whether a promotion can be turned down to a physically disabled person owing to the absence of provision dealing with the same?**

Section 32 of the 1995 Act requires the government to identify positions that can be performed by people with disabilities. As a result, even promotional cadre positions must be designated for Person with disability and reserved for them. Identification of such positions is, without a doubt, a need for person with ability reservation in promotion.

There is no approach that can be utilised to overcome the reservation in promotion. Once that position has been established, the obvious conclusion is that it will be designated for people with disabilities who have been promoted. The lack of guidelines to allow for reservation in promotion would not negate the rights of PwD to a reservation in promotion because it is derived from the legislation, and this, in our opinion, is the mandate's foundation.

In its recent decision in *Vikash Kumar vs. Union Public Service Commission*[6], this Court gave Section 20 read with Section 2 of the latter 2016 Act a wide meaning (y). A consideration of the aforementioned laws reveals that non-discrimination in the workplace is a legislative obligation. In the context of sub-section (2) of Section 20, where the expression "reasonable accommodation" is used as an aspect to be provided by government establishments, this expression has been defined in Section 2(y) to mandate necessary and appropriate modifications and adjustments to ensure that person with disabilities enjoy or exercise their rights equally with others.

### **IV. Whether the respondent can be given promotion taking her physical disability into account, notwithstanding the fact that she was not appointed through the concerned quota?**

The anomaly which would arise from the submission of the appellant-State is apparent - a person who came in through normal recruitment process but suffers disability after joining

service would on a pari materia position be also not entitled to be considered to a vacancy in a promotional post reserved for a Person with disability.

From that it appears that the post of UDC/Cashier would be amenable to reservation for Physically disabled and thus there can be little doubt that the respondent has been capable of discharging functions of the promotional post and thus could not be denied the benefit of reservation (even if Rules do not provide for any reservation in promotion) as repeatedly observed by us that Section 32 of the 1995 Act is to facilitate but not to impede the legislative mandate.

The direction in the impugned order was for the respondent to be considered for the promotion based on disability at the time when the claim originally arose, but subject to her seniority with reference to other physically disabled candidates entitled to such reservation.

In the factual context, it has been pointed out by learned Amicus Curiae that the respondent had claimed a promotion to the post of UDC with effect from 1 st July, 2002 and further to the post of Cashier with effect from 20th May, 2012.

### **VIII. JUDGMENT**

Thus, the Supreme Court considered it appropriate to issue directions to the State of Kerala to implement these judgments and provide for reservation in promotion in all posts after identifying said posts.

The Court upheld the course of action followed by the High Court in the impugned order is salutary and does not call for any interference.

### **IX. CRITICAL ANALYSIS**

The Court mentioned that Section forty seven of the 1995 Act which (offers with non-discrimination in authorities employment) must be studied within the context of the reason of the Act, that is to offer identical possibilities for profession progression. Denying reservation on the merchandising degree might be negating this reason. Further, the Court additionally mentioned that the 3% reservation might follow to a complete wide variety of vacancies, which incorporates each new nomination, in addition to promotions. The Appellant State's submission that the 3% reservation as in line with the 1995 Act became most effective relevant to new nominations became set aside.

The Bench together with Justice Sanjay Kishan Kaul and Justice Subhash Reddy stated *Vikash Kumar v. Union Public Service Commission*. In this 2021 judgement, the Court mentioned that "affordable accommodation" covered any important and suitable changes as in line with

Section 2(y) of The Rights of Persons with Disabilities Act, 2016. The Bench held that this interpretation additionally implemented to State of Kerala v. Leesamma Joseph. Finally, the Bench additionally held that the absence of guidelines at the reservations in promotions did now no longer absolve the State from having to perceive posts for reservation. Additionally, the reality that Leesamma Joseph became appointed out of compassion, did now no longer put off her proper to reservation in merchandising.

## **X. CONCLUSION**

The decision of the Hon'ble Supreme Court, beyond the shadow of the doubt, has wider implications on the Law. It goes without saying that the ruling of the court to ensure Constitutional right of article 16 turns out be an important precedent for the upcoming cases. In spite of the various setbacks, this ruling is much needed to reinforce the ideal of Equality in the minds of the people.

## **XI. REFERENCE**

- [1] Siddaraju vs. State of Karnataka & Ors, 2020 3 SCALE 99
- [2] Union of India vs. National Federation of the Blind, (2013) 10 SCC 772.
- [3] National Confederation for Development of Disabled and Anr. vs. Union of India and Ors, 2015 SCC OnLine Bom 5112
- [4] Rajeev Kumar Gupta and Others vs. Union of India and Ors., (2016) 13 SCC 153
- [5] Indra Sawhney and Ors. vs. Union of India, 1992 Supp (3) SCC 217
- [6] Vikash Kumar vs. Union Public Service Commission, 2021 (2) SCALE 468

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